Supreme Court, U.S.
FILED
SEP 6 1989
JOSEPH F. SPANIOL, JR.

No. 88-148

In the Supreme Court of the United States

OCTOBER TERM, 1989

SOUTHERN NATURAL GAS COMPANY, PETITIONER

v.

JOSEPH F. FRITZ, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

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This case presents the question whether the Supreme Court of Mississippi erred in failing to apply the Federal Energy Regulatory Commission's interpretation of a federal regulation concerning the contract price of natural gas, where petitioner raised compliance with that regulation as a defense to the breach of contract action filed by respondents in state court. After this Court invited and received a brief filed by the Solicitor General expressing the views of the United States,[1] petitioner filed a motion

[1] The United States and the Federal Energy Regulatory Commission recommended that the Court grant the petition, and vacate and remand the judgment of the Mississippi Supreme Court for further consideration in light of the Commission's declaratory order. Alternatively, we recommended either holding the petition pending the Fifth Circuit's decision in *Fritz* v. *FERC*, No. 88-4410, or simply denying the petition.

requesting the Court to defer consideration of the petition for a writ of certiorari pending the result of *Fritz* v. *FERC*, No. 88-4410 (5th Cir.). On February 27, 1989, the Court granted that request. We file this supplemental submission to apprise the Court of the Fifth Circuit's disposition of *Fritz* v. *FERC*, 876 F.2d 1224 (1989), which in effect eliminates any conflict between the Commission and the Supreme Court of Mississippi concerning the proper interpretation of the federal regulation on the facts presented here. In our view, therefore, the petition for a writ of certiorari should now be denied.

1. This case stems from parallel proceedings before the Mississippi state courts and the Federal Energy Regulatory Commission that resulted in conflicting decisions. Those decisions involved the application of a Commission regulation to a dispute over a contract for the sale of natural gas between the purchaser, petitioner Southern Natural Gas Company, and the seller, respondents Joseph F. Fritz and Exxon Corporation. The Supreme Court of Mississippi ultimately held that the Commission's regulation, 18 C.F.R. 270.207, did not excuse Southern's breach of contract, and upheld an award of damages. Pet. App. 1a-17a. FERC, on the other hand, issued a declaratory order that Southern would have violated the federal regulation if it had paid the contract price. *Southern Natural Gas Co.*, 40 F.E.R.C. ¶ 61,225 (1987), reh'g denied, 43 F.E.R.C. ¶ 61,454 (1988) (Pet. App. 31a-45a).

As a result of its conflicting obligations under the state court's judgment and FERC's declaratory order, Southern filed a petition for a writ of certiorari. At the same time, Fritz and Southern each filed petitions for review of the Commission's ruling in the Fifth Circuit.

2. On July 12, 1989, the Fifth Circuit vacated the Commission's ruling and held that, on the record presented, Southern would not violate the Commission's

regulation, 18 C.F.R. 270.207, by paying Fritz the contract price for deregulated natural gas. *Fritz* v. *FERC*, 876 F.2d 1224, 1228-1231 (5th Cir. 1989). The court of appeals concluded that the Commission, without an adequate explanation, "departed from its previous construction and application" of Section 270.207 (876 F.2d at 1230), and, in so doing, had not made "the factual inquiry necessary to determine whether any portion of the price for deregulated gas represented consideration for the sale of regulated gas" (*id.* at 1229). Accordingly, the court held that FERC's orders concluding that Southern would have violated Section 270.207 by paying the full contract price "cannot stand" (*id.* at 1230).

Instead of remanding the case to the Commission for further factual determinations, the court of appeals chose to rely upon the factual findings of the Mississippi state courts in the parallel proceedings. Based on that record, the court of appeals found that "no portion of the price Southern agreed to pay Fritz for * * * [deregulated gas] represented consideration for regulated gas" (876 F.2d at 1231). The court therefore held that "payment for unregulated gas under the pricing provision in the contract between Fritz and Southern do not violate Regulation 270.207" (*ibid.*).

3. The Commission has decided not to seek further review of the Fifth Circuit's decision in *Fritz* v. *FERC*. On August 25, 1989, Southern filed a petition for rehearing, which remains pending before the court of appeals.

4. Southern predicated its petition for a writ of certiorari on the fact that the Mississippi Supreme Court's judgment and FERC's declaratory orders subjected it to conflicting obligations. In light of the Fifth Circuit's decision in *Fritz* v. *FERC*, however, Southern is no longer in any such position. Moreover, in our submission in response to the Court's invitation, we explained why the

question presented did not warrant this Court's plenary review, even if the Commission's orders were upheld by the Fifth Circuit. See Gov't Br. 15-17.[2]

Since the Fifth Circuit's decision has now eliminated the principal concern that may have rendered further review appropriate, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

SEPTEMBER 1989

[2] Indeed, the Fifth Circuit's decision effectively renders moot the question presented in the petition—whether the state court erred in refusing to apply the Commission's interpretation of Section 270.207.

U.S. GOVERNMENT PRINTING OFFICE: 1989—241 699:00416